

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

LOCAL 8027, AFT-NEW HAMPSHIRE, AFL-CIO, RYAN)
RICHMAN, JOHN DUBE and JOCEYLN MERRILL,)
teachers in the New Hampshire Public Schools, and)
KIMBERLY GREEN ELLIOTT and MEGHAN EVELYN)
DURDEN, parents or guardians of children in the New)
Hampshire public schools.)

Plaintiffs,)

v.)

FRANK EDELBLUT, in his Official Capacity as)
Commissioner of the DEPARTMENT OF EDUCATION)
("DOE"), CHRISTIAN KIM in his Official Capacity as the)
Chair of the NEW HAMPSHIRE COMMISSION ON)
HUMAN RIGHTS, and JOHN FOMELLA in his Official)
Capacity as ATTORNEY GENERAL of the State of New)
Hampshire.)

Defendants.)

Civil No. 1:21-cv-01077-PB

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ANDRES MEJIA,)
CHRISTINA KIM PHILIBOTTE, and)
NATIONAL EDUCATION ASSOCIATION-NEW)
HAMPSHIRE,)

Plaintiffs,)

v.)

FRANK EDELBLUT, in his official capacity only as the)
Commissioner of the New Hampshire Department of)
Education,)
JOHN M. FORMELLA, in his official capacity only as the)
Attorney General of the State of New Hampshire,)
AHNI MALACHI, in her official capacity only as the)
Executive Director of the New Hampshire Commission for)
Human Rights,)
CHRISTIAN KIM, in his official capacity)
only as the Chair of the New Hampshire Commission for)
Human Rights,)
KEN MERRIFIELD, in his official capacity only as the)
Commissioner of the Department of Labor,)

Defendants.)

**PLAINTIFFS' JOINT RESPONSE TO NOTICE OF SUPPLEMENTAL
AUTHORITY**

Plaintiffs jointly submit their response to Defendants’ November 8, 2022 Notice of Supplemental Authority informing this Court of the First Circuit’s opinion in *Frese v. Formella*, No. 21-1068. *Frese* is distinguishable. Unlike the Banned Concepts Act, the criminal defamation statute in *Frese* “adopts part of New Hampshire’s common law defamation standard,” and, in so doing, provides “guidance to law enforcement about the meaning of the statute.” *See* Slip Op. at 10. The Banned Concepts Act contains no such limiting criteria that would aid those charged with that Act’s enforcement. *See id.* at 10-11, 17. Nor does the Act contain a *mens rea* requirement, unlike the statute in *Frese*. *See id.* at 10 (noting the “requirement that the speaker know the statement to be false”), 11 (noting cases where laws “did not contain a requirement that the speaker know the statement to be false”), 17.

Further, unlike *Frese* where the plaintiff “offere[d] no hypothetical example of how a factfinder might struggle unduly” to apply the law in question, *see id.* at 10, such examples were presented here, including actual instances of excesses (e.g., mere non-classroom Petition signing, etc.). Further, just as the *Frese* Court highlighted district court decisions in addressing ambiguity, *see id.*, here two district courts in Florida and California have deemed vague laws similar to the Act. Indeed, just as the *Frese* Court called for “example[s] of how a factfinder might struggle unduly” with the challenged statutory language, *see id.*, these district court opinions make that point in invalidating the challenged language. Finally, *Frese*’s reference to the 1987 *Salerno* “no set of circumstances” standard, *see id.* at 8, is consistent with the standard set forth in *Johnson v. United States*, 576 U.S. 591 (2015), which effectively interpreted the *Salerno* framework. *Id.* at 603 (“If we hold a statute to be vague, it is vague in all its applications (and never mind the reality).”).

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Respectfully Submitted,

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